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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 1206

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WALTER JOHNSON, individually and as Secretary-Treasurer of DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100, an unincorporated association, on behalf of himself and all its members, and WILLIAM SILVERSTEIN, individually and as Secretary-Treasurer of RETAIL SHOE & TEXTILE SALESMEN'S UNION, LOCAL 410, an unincorporated association, on behalf of himself and all its members, *Petitioners,*

vs.

RAPHAEL WEILL & CO., INC., d/b/a THE WHITE HOUSE, et al.; JOHN M. ENGLAND, C. E. STROBEL, and WALTER J. HEMPY, as Trustees in Bankruptcy of Raphael Weill & Co., Inc., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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No.

WALTER JOHNSON, individually and as Secretary-Treasurer of DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100, an unincorporated association, on behalf of himself and all its members, and WILLIAM SILVERSTEIN, individually and as Secretary-Treasurer of RETAIL SHOE & TEXTILE SALESMEN'S UNION, LOCAL 410, an unincorporated association, on behalf of himself and all its members,

Petitioners,

vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of

Appeals for the Ninth Circuit entered in the above cause January 12, 1966.

OPINIONS BELOW

The opinion of Pope, Circuit Judge, concurred in by Circuit Judges Chambers and Koelsch, for the United States Court of Appeals for the Ninth Circuit, rendered January 12, 1966 (Appendix A, p. 1) is reported in 355 F. 2d .....

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1966. (Appendix C, p. 35.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. May a party to a collective bargaining agreement be denied its state created right to maintain a suit for enforcement of that agreement in a state court by removal of the suit to a federal district court and retention therein on the ground that Section 301 (a) of the National Labor Relations Act, as amended, operates to pre-empt this field of the law thereby investing exclusive jurisdiction in the federal courts?

2. May the right of a labor organization under a collective bargaining agreement to submit to arbitration disputes pending between it and an employer party to such agreement be nullified by the subsequent

filing of a voluntary petition in bankruptcy by the employer?

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (herein the "Act"), are printed in Appendix B hereto, p. 19. The official citation to these statutory provisions is 61 Stat. 136 (1947); Section 2(1), Section 201, Section 203(d), Section 301, Section 301(a).

The pertinent provisions of the Bankruptcy Act are printed in Appendix B hereto, p. 21. The official citation to these statutory provisions is 30 Stat. 544; Section 2, Section 70.

The pertinent provisions of the Removal Statute are printed in Appendix B hereto, p. 33. The official citation to these statutory provisions is 36 Stat. 1094; Section 1441(b).

STATEMENT

Petitioners are Walter Johnson and William Silverstein, officers respectively of Department Store Employees Union, Local 1100, and Retail Shoe & Textile Salesmen's Union, Local 410 (herein called "Unions"). Both unions are labor organizations affiliated with the Retail Clerks International Association, AFL-CIO, and are the collective bargaining representatives of the employees of respondent Raphael Weill & Co., Inc., doing business in San Francisco as the White House (herein called "White House"), a retail department store.

On or about January 20, 1965, the Unions learned for the first time that the White House had failed to comply with the provisions of the existing collective bargaining agreement between the parties, requiring contributions by the White House to a pension fund established pursuant to the collective bargaining agreement for the benefit of the White House employees. Certain other disputes also arose between the Unions and the White House at this time. These disputes involved retroactive wages, sick leave, layoffs, severance pay, guaranteed work during a "final" merchandise sale by the White House, and re-employment in the event the White House closed its operations, as indicated, and thereafter determined upon re-opening.

The representatives of the White House having failed or refused to comply with the demands of the Unions that these disputes be submitted to arbitration pursuant to the terms of the aforesaid collective bargaining agreement, petitioners, on January 27, 1965, on behalf of themselves and all of the members of said Unions, commenced suit in the Superior Court in and for the City and County of San Francisco, State of California, seeking enforcement of the collective bargaining agreement through an order compelling the White House to submit the aforesaid disputes to arbitration pursuant to the terms of the collective bargaining agreement. (R. Vol. 1, p. 4.) Petitioners' suit in the state Court was brought under a statute of the State of California granting to a party to an arbitration agreement the right to a summary Court order requiring the other party thereto to sub-

mit to arbitration all disputes arising under the terms of that agreement.[1] On the same day that petitioners' suit was filed the State Superior Court issued an order to show cause and a temporary restraining order prohibiting the White House from dissipating or otherwise transferring the sum of $158,000.00 pending a hearing on the Court's order to show cause why an order to compel arbitration should not be issued.[2] (R. Vol. 1, p. 19.)

On February 3, 1965, and before the hearing in the state Court on its order to show cause could be held, the White House filed a voluntary petition in bank-

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[1]The Code of Civil Procedure of the State of California, invoked by petitioners, provides, in Section 1281.2 as follows:

§ 1281.2. *Order to Arbitrate controversy; petition; determination of court.*

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

[2]Later, during the course of the proceedings in the lower federal courts, petitioners discovered and respondents did not deny that the amount of contributions due from the White House to the pension fund was, in fact, approximately $300,000. (R. Vol. 1, p. 90.)

ruptcy in the United States District Court, for the Northern District of California, Southern Division, and closed its retail department store where the Unions' members were employed. Approximately a week later, on February 11, 1965, after hearing, the State Superior Court granted the relief sought by petitioners and directed arbitration of the controversies between the parties, pursuant to the collective bargaining agreement. The Court also issued a preliminary injunction requiring the deposit in Court of the aforementioned $158,000.00, pending the arbitration award or further order of the Court. (R. Vol. 1, p. 49.)

Later on the same day, February 11, 1965, respondents filed in the U. S. District Court a petition for removal to that Court of the state Court action. (R. Vol. 1, p. 1.) Petitioners' motion to remand to the state Court was denied by the District Court and the latter Court then proceeded to dissolve all of the orders of the state Court requiring respondent to submit to arbitration and to deposit the said sum of money with the state Court. (R. Vol. 1, pp. 86, 131.)

The Court of Appeals for the Ninth Circuit, in affirming the District Court's orders, found that petitioners' motion to remand was denied by the District Court upon the ground that it had original jurisdiction of the action under Section 301(a) of the National Labor Relations Act, as amended. The Court of Appeals then concluded that since Section 301(a) operated to *pre-empt* this field of law, the case was properly removable to the federal district court. (Appendix A, p. 9.)

Concerning petitioners' contention that federal labor policy entitles them to have their pending disputes with the White House submitted to arbitration under the collective bargaining agreement, the Court of Appeals for the Ninth Circuit held that the subsequent voluntary filing of the petition in bankruptcy by the respondent operated to nullify the rights and obligations of the parties to the arbitration agreement. Disregarding the status and claims of the Unions as parties to the collective bargaining agreement, the Court of Appeals decided that by the petition in bankruptcy the employees became merely creditors of the presently bankrupt employer, and, as such, the Unions' prior right to invoke the provisions of the collective bargaining agreement on their behalf was extinguished. (Appendix A, p. 15).

REASONS FOR ALLOWANCE OF WRIT

1. THIS CASE RAISES A FUNDAMENTAL QUESTION UNRESOLVED BY THE SUPREME COURT REGARDING THE EFFECT OF THE ENACTMENT BY CONGRESS OF SECTION 301 OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, UPON THE TRADITIONAL EXERCISE OF JURISDICTION BY STATE COURTS OVER SUITS FOR VIOLATION OF COLLECTIVE BARGAINING AGREEMENTS.

Petitioners commenced this suit in the state Court and relied on the provisions of state statutory law, to wit, Section 1280, et seq., of the Code of Civil Procedure of the State of California. That petitioners have a right to elect to proceed in a state Court even though they could have commenced their suit in a federal Court is clear. *Henry v. A. B. Dick Co.*, 224

U.S. 1, *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22; *Tennessee v. Union & Planters' Bank*, 152 U.S. 454; *Minnesota v. Northern Securities Co.*, 194 U.S. 48; *Gully v. First National Bank in Meridian*, 299 U.S. 109; *Debevoise v. Rutland Ry. Co.* (C.A. 2, 1961), 291 F. 2d 379, cert. den. 368 U.S. 876; *Peterson v. Brotherhood of Locomotive Firemen and Engineers* (C.A. 7, 1959) 272 F. 2d 115.

The lower Courts, in denying petitioners' motion to remand this case to the state Court where the suit was originally filed, have done two things: First, they have deprived petitioners of their right under California statute and federal law to proceed in a state Court of appropriate jurisdiction. Secondly, they have by denying remand effectively deprived the Courts of the State of California of their right to exercise their traditional jurisdiction over suits for violation of a collective bargaining agreement.

The lower Courts here have decided that the above consequences inevitably occur whenever one of the parties to a suit involving the enforcement of a collective bargaining agreement in an industry affecting commerce chooses to remove the case from the state Court to a federal forum. The result of the lower Court decisions is that the ascertainment and exercise of jurisdiction in each case is taken from the Courts themselves and deposited with the party to the suit who chooses to seek removal to a federal Court.

Such a concept as that propounded by the Court of Appeals in upholding removal is alien to the historically significant comity doctrine which proscribes

avoidable conflicts between federal and state Courts. *Covell v. Heyman,* 111 U.S. 176. It is also in conflict with the specific holding of this Court in *Dowd Box v. Courtney,* 368 U.S. 502,[3] upholding the exercise by state Courts of jurisdiction over suits such as that in the instant case, notwithstanding the investiture by Congress, in its enactment of Section 301, of additional jurisdiction in the federal Courts.

It is fair to say that the enforcement of the rights and obligations under the terms of collective bargaining agreements is of paramount concern to the parties to those agreements, wherever they might be in the United States. Probably not a day passes without a suit being filed in a state or federal Court by one or the other of the parties to such an agreement seeking its enforcement or attempting to recover for its breach.[4] This is as it should be in view of the policy enunciated by Congress in its enactment of the National Labor Relations Act. That policy is to promote the achievement of industrial peace through encour-

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[3]This Court, after reviewing the comity doctrine, stated in *Dowd Box v. Courtney:* "To hold that § 301(a) operates to deprive the state courts of a substantial segment of their established jurisdiction over contract actions would thus be to disregard this consistent history of hospitable acceptance of concurrent jurisdiction." (p. 508.)

[4]The report of the Director of the Administrative Office of the United States Courts for the period from July 1, 1965 to December 31, 1965, shows that 768 suits involving federal labor laws were filed in the United States District Courts by private litigants. 371 suits involving the National Labor Relations Act, as amended, were commenced during that period by private litigants. The District Courts in the Ninth Circuit were the forums for 96 of these suits. And these statistics do not take into consideration the undoubtedly substantial number of suits for enforcement of collective bargaining agreements filed in the state courts.

agement and refinement of the collective bargaining process.

As this Court has pointed out in *Dowd Box v. Courtney,* 368 U.S. 502, Section 301(a) reflects Congressional awareness that means should be defined and preserved for assuring that these agreements would be honored by the parties thereto. As was there found, the ability to bring suit in the state Courts has been determined by the Congress to be an appropriate and salutary method of assuring the enforceability of these agreements, and at no time did Congress intend by the enactment of Section 301(a) to displace this thoroughly considered jurisdiction. That the states have more than a peripheral interest and concern in the enforcement of collective bargaining agreements, in terms of the achievement and preservation of stable and harmonious relations between the parties to those agreements, cannot be doubted. The practical deprivation of jurisdiction in the state judicial tribunals over suits for violation of these agreements, resulting from the instant Ninth Circuit Court of Appeals' decision, renders impotent the states' means for achieving their legitimate interests and objectives.

In view of the importance of the retention of jurisdiction in the state Courts as a forum to which parties to collective bargaining agreements can turn for the enforcement of their rights, and because the many parties to the substantial number of collective bargaining agreements in the United States today frequently seek means for the enforcement of those agreements in the state Courts under state-created

rights, the question concerning the propriety of removal and denial of remand in such cases requires a solution through a review by this Court.

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2. THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE ISSUE OF REMOVABILITY AND REMAND IS IN ERROR AND IS IN CONFLICT WITH DECISIONS OF THIS COURT AND THE DECISION OF THE COURT OF APPEALS OF ANOTHER CIRCUIT.

In holding that the District Court properly denied petitioners' motion to remand the proceedings to the California Superior Court, upon the ground that the federal Courts have original jurisdiction within the meaning of Section 1441(b) of the Removal Statute[5] of suits for violation of collective bargaining agreements by virtue of Section 301(a), the Court of Appeals for the Ninth Circuit has come into apparent conflict with a decision of the Court of Appeals for the Third Circuit and has further premised its decision on a theory frequently rejected by this Court.

The Court below has based its finding of jurisdiction in the federal Courts of suits of the nature of the instant one upon the rationale that since substantive principles of federal law apply to these suits when brought in state Courts (*Teamsters Union v. Lucas Flour,* 369 U.S. 95), Section 301(a) has, therefore, *pre-empted* this field of law and *jurisdiction* is thereby vested in the federal Courts. (Appendix A, p. 9.)

The Court of Appeals' holding demonstrates its misconception of the definition and effect of the federal

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[5]28 U.S.C. § 1441(b) (Appendix B, p. 34).

pre-emption doctrine. See *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, and *Garner v. Teamsters, C. & H. Local Union,* 346 U.S. 485. To say, as does the Court of Appeals, that Section 301 pre-empts this field of law so as to make a suit for violation of a collective bargaining agreement brought in a state Court always removable to a federal Court is to say that the federal Court has *exclusive* jurisdiction, as opposed to concurrent jurisdiction with the state Courts. The Court of Appeals' holding is that since suits for violation of collective bargaining agreements are subject to "uniform law" (*Teamsters Union v. Lucas Flour,* 369 U.S. 95), substantive federal law operates to pre-empt the *jurisdiction* of state Courts.

This reasoning is in direct conflict with this Court's decision in *Dowd Box v. Courtney,* 368 U.S. 502,[6] and misconceives the significant distinction between pre-emption in terms of the application of uniform federal substantive law by state Courts and federal pre-emption in terms of the exclusive jurisdiction of federal Courts over the state Courts. There can be little question, in the light of its erroneous pre-emption rationale, that the holding of the Court of Appeals for the Ninth Circuit, if allowed to stand, has the effect of granting to the federal Courts *exclusive* jurisdiction over all suits for enforcement of collective bargaining agreements in industries affecting commerce. *Dowd*

[6] As this Court there said: "The legislative history of the enactment nowhere suggests that, contrary to the clear import of the statutory language, Congress intended in enacting § 301(a) to deprive a party to a collective bargaining contract of the right to seek redress for its violation in an appropriate state tribunal." (p. 507.)

Box v. Courtney, supra, is directly to the contrary, and is, of course, controlling.

This Court has consistently held that a case does not *arise* under the Constitution or laws of the United States within the meaning of the Removal Statute merely because it is *founded* on a right conferred by the Constitution or a federal law. *Cohens v. Virginia,* 6 Wheat. 264; *Osborn v. Bank of United States,* 9 Wheat. 738; *Shultis v. McDougal,* 225 U.S. 561; *Gully v. First National Bank in Meridian,* 299 U.S. 109; *Pan American Petroleum Corp. v. Superior Court of Delaware,* 366 U.S. 656.

In *Pan American Petroleum Corp. v. Superior Court of Delaware,* supra, the Court reaffirmed the doctrines elaborated upon in the above cited decisions and in so doing set forth the following jurisdictional principles which are pertinent and applicable to the case at bar:

1. ". . . [Q]uestions of exclusive federal jurisdiction *and ouster of jurisdiction of state courts are,* under existing jurisdictional legislation, *not determined by ultimate substantive issues of federal law."* (Id. at p. 662; emphasis supplied.)

2. "The answers depend on *the particular claims a suitor makes in a state court—on how he casts his action.* Since *'the party who brings a suit is master to decide what law he will rely upon'. The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716". (Id. at p. 662; emphasis supplied.)

3. "It is 'immaterial . . . that the plaintiff could have elected to proceed on a federal ground', and *'if the plaintiff decides not to invoke a federal*

right, his claim belongs in a state court'." (Id. at p. 663; emphasis supplied.)

4. "It is settled doctrine that a case is not cognizable in a federal trial court, in the absence of diversity of citizenship, *unless it appears from the face of the complaint* that determination of the suit depends upon a question of federal law . . . . " (Id. at p. 663; emphasis supplied.)

5. "Apart from diversity jurisdiction '*a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal . . .*" (Citing *Gully v. First National Bank,* supra.) (Id. at p. 663; emphasis supplied.)

These well established principles were entirely overlooked by the Court of Appeals for the Ninth Circuit.

The decision below is also in probable conflict with the decision of the Court of Appeals for the Third Circuit in *American Dredging Co. v. Local 25, Marine Division, International Union of Operating Engineers,* 338 F. 2d 837 (1964), cert. den. 380 U.S. 935.

The Third Circuit case involved an action by an employer in a state Court in Pennsylvania to enjoin a union's breach of a "no-strike" clause in a collective bargaining agreement. The union removed the action to the federal district Court and that Court denied the employer's motion to remand the case to the state Court.[7] The Court of Appeals vacated the district

[7]The District Court's opinion is reported at 224 F. Supp. 985.

Court's order denying remand upon the broad ground that the action was *not* founded on a claim or right arising under the Constitution, treaties or laws of the United States so as to make it removable within the meaning of Section 1441(b) of the Removal Statute.

Because the suit in the *American Dredging Co.* case involved a request for injunctive relief, and thereby fell within the strictures of the Norris-La Guardia Act,[8] the Court of Appeals for the Third Circuit found that the federal Courts were deprived of subject matter jurisdiction since they could not dispose of the case upon the merits in view of Norris-La Guardia. The Court nevertheless went on to specifically reject the thesis that suits for violation of collective bargaining agreements were removable from state Courts to federal Courts under Section 1441(b) of the Removal Statute. The Court then ordered remand to the state Court after a thorough analysis of the hereinabove cited decisions of this Court on the question of when an action is *founded* on a claim or right *arising* under the Constitution, treaties or laws of the United States. The Third Circuit concluded that the action for violation of a collective bargaining agreement brought in the state Court was not a suit founded on a claim or right arising under Section 301(a), and that the denial of remand ousted the state Court of its jurisdiction in direct contravention of the comity doctrine and of this Court's holding in *Dowd Box v. Courtney,* supra. Consequently, such a

[8] 29 U.S.C. § 104.

suit had to be remanded to the state Court as being "removed improvidently and without jurisdiction". (338 F. 2d 837, 846-847, 850.)

The uncertainties created by the conflicting decisions of the circuits, as well as by the holding of the Court of Appeals for the Ninth Circuit in the instant matter that Section 301(a) pre-empts the jurisdiction of state Courts, clearly should be resolved upon review by this Court. This Court has recognized that this important question remains to be decided.[9]

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3. THE DECISION OF THE COURT OF APPEALS RAISES NOVEL AND IMPORTANT QUESTIONS CONCERNING THE APPLICATION OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND THE SUBSTANTIVE FEDERAL LAW ESTABLISHED THEREUNDER TO THE PARTIES TO A COLLECTIVE BARGAINING AGREEMENT WHERE THE EMPLOYER PARTY TO THE AGREEMENT INSTITUTES BANKRUPTCY PROCEEDINGS. SUCH QUESTIONS HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The basic question in this case, aside from the important issue of removability, is whether or not Congress, by its enactment of Section 301 of the National Labor Relations Act, intended to provide for the enforcement of the arbitration provisions of a collective bargaining agreement for the purpose of determining disputes arising thereunder during the course of the employer's business operations, even though the employer during the pendency of such disputes voluntarily submits to bankruptcy proceedings and closes

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[9] *Dowd Box v. Courtney*, supra, Footnote 8 at page 514.

its business. The decision of the Court of Appeals is that no such provision was made or intended by the Congress. Thus, in the view of the lower Court the provisions of the bankruptcy statute and the policy of Congress manifested thereunder supersede and are paramount to the provisions and substance of the national labor law and policy.

It cannot be too greatly emphasized that bankruptcy is more and more becoming a subject of importance to the parties to collective bargaining agreements. For the period July 1, 1965 to December 31, 1965, some 91,596 bankruptcy cases were filed, an eight per cent increase over the number filed during the same period of the previous year.[10] The grave probability of a "collision" in the application of the bankruptcy law and the substantive principles of federal labor law, manifested in the present case and resulting from the increase in bankruptcies and the substantial numbers of private suits for the enforcement of collective bargaining agreements, brought in both state and federal Courts, requires a solution by the Court.

The effect of the decision of the Court of Appeals is to put both employers and the unions that represent their employees on notice that any collective bargaining agreement that they negotiate may be rendered

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[10]Bankruptcies pending as of December 31, 1965 in the United States District Courts total 165,397. Although these represent principally consumer bankruptcies, it is reasonable to conclude that business bankruptcies are increasing in similarly significant fashion. *Report of the Director of the Administrative Office of the United States Courts*, p. 2.

inapplicable and of no force and effect as to disputes arising thereunder if the employer should later choose to file an application for adjudication as a bankrupt while such disputes remain pending and unresolved.[11]

An inevitable consequence of the decision is to substantially impede the effectuation of Congressional policy requiring employers and unions to bargain upon request on various subjects pertaining to the employment conditions of that part of the nation's working force represented by labor unions. Thus, such matters as pensions (*Inland Steel Co.* (C.A. 7, 1948), 170 F. 2d 247), working schedules (*Timken Roller Bearing Co.*, 70 NLRB 500), layoffs, (*U.S. Gypsum Co.*, 94 NLRB 112), and reemployment (*National Gas Co.*, 99 NLRB 273), which can and do regularly arise and which have peculiar application at the point of termination of an employer's operations, are subjects which must be negotiated by employers and unions upon the request of one or the other of them in attempts to reach agreements on the working conditions of the affected employees. Unless this Court settles the question here presented, these negotiations, which, of course, occur at the initial stages of the collective bargaining process, will be seriously influenced and disrupted by an awareness

[11]It is, of course, well settled that disputes arising prior to the termination of a collective bargaining agreement or the closing of an employer's business remain subject to determination pursuant to the arbitration processes of the agreement. *Republic Steel v. Maddox*, 379 U.S. 650; *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448; *Goodall-Sanford Inc. v. United Textile Workers* (CA 1, 1956), 233 F.2d 104, 110; *United Furniture Workers v. McCoy Couch Furniture Mfg. Co.* (D.C. Ark., 1963), 223 F. Supp. 880.

on the part of the parties to the negotiations that their agreements will have no effect whatsoever if the employer should subsequently choose to submit to bankruptcy under the federal bankruptcy laws.[12]

The grievance procedure, including the provisions for arbitration, are likewise part and parcel of the collective bargaining process. Such mechanisms are at the very heart of a system of industrial democracy. This Court has been frequently called upon to stress the desirability and necessity of arbitration as the means of solution of the many diverse problems arising under the provisions of collective bargaining agreements and to amplify its salubrious effect in calming the sometimes turbulent sea of labor-management relations. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448; *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564; *United Steelworkers v. Enterprise Corp.,* 363 U.S. 593; *United Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574; *Republic Steel v. Maddox,* 379 U.S. 650.

There can be no one thing more potentially disruptive of labor peace than the impending termination of the employer-employee relationship. It is at this point that the grievance procedure and arbitration become of vital importance to the maintenance of a semblance of order in what might otherwise become a chaotic situation. The very bargaining subjects which Congress has declared to be necessary to the full effec-

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[12]This Court has recognized the inhibiting influence which a subsequent event rendering inoperative the terms of a labor agreement may have upon the very preliminary stage of the collective bargaining process. *Republic Steel v. Maddox,* 379 U.S. 650, 656.

tiveness of the collective bargaining concept enunciated in our labor law are nowhere more seriously threatened than at this point. Here, arbitration becomes particularly necessary and appropriate. Thus, where the parties have so agreed, as in the instant matter, methods can be devised through the arbitration mechanism for the most acceptable and satisfactory solutions to the serious ramifications stemming from the termination of business operations.

The effect of the decisions of the lower courts herein is that the processes and concepts enunciated by Congress in the National Labor Relations Act for the peaceful adjustment of labor disputes already instituted by the parties to the collective bargaining agreement are brought to an abrupt halt when an employer decides to file a petition in bankruptcy. The crucial issue is whether the Bankruptcy Act requires such a conclusion. The answer seems clearly to be that it does not. The Bankruptcy Act itself recognizes the principle of arbitration as a desirable means of resolving certain disputes concerning the affairs of the bankrupt employer.[13] *Tobin v. Plein* (C.A. 2d 1962), 301 F. 2d 378. No sound reason suggests itself as to why the even stronger endorsement of arbitration between labor and management expressed by Congress in our national labor laws and policies should not be given respect. This seems particularly so in view of the fact that trustees in bankruptcy have been expressly included as subject to the provisions of the

[13]Section 26, 11 U.S.C. § 49.

National Labor Relations, as amended, by Section 2(1) thereof.[14]

The decision of the Court of Appeals for the Ninth Circuit interprets the bankruptcy laws so as to deny protection of the contractual remedy of arbitration under a collective bargaining agreement as a means of resolving preexisting disputes between a union and an employer, simply because the employer thereafter performs the voluntary act of filing a petition in bankruptcy. The effect of such a holding is to remove from the National Labor Relations Act its most effective and salutary provisions for the maintenance of harmonious relations between labor and management, and it ignores a fundamental element of our national labor policy affirmed by this Court on numerous occasions.

Both the Bankruptcy Act and the National Labor Relations Act, as amended, are acts of Congress, founded upon Constitutional authority, and manifest the legitimate intent of the federal government in establishing and maintaining rules declared to be desirable in the regulation of the various relationships between and among citizens. It is axiomatic that Courts should make every effort to reconcile and harmonize these two apparently equal statutes, in terms of their Congressional source, to give effect to the language and intent of each. *United States v. Borden Co.*, 308 U.S. 188.

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[14] 29 U.S.C. § 152(1).

This judicial approach was followed by this Court in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448. There, specific performance of an arbitration clause under Section 301(a) was permitted despite the literal language of the Norris-La Guardia Act,[15] which would restrict Section 301(a) to damage actions. The Court considered the abuses which Norris-La Guardia was designed to correct. Since failure to arbitrate was not a part of such abuses and the Congressional policy favoring arbitration was clear there was no reason to subject Section 301(a) to Norris-La Guardia restrictions.

In *Nathanson, Trustee v. National Labor Relations Board,* 344 U.S. 25, it was held that particular controversies "should be remitted to another tribunal for litigation" (344 U.S. at 30), and, further, that "wise administration . . . demands that the bankruptcy court accommodate itself to the administrative process." (Id. at 30.)

The specific application of the National Labor Relations Act, as amended, to trustees in bankruptcy, by Section 2(1) (29 U.S.C. § 152(1)), makes the decisions upholding the power of Congress to vest jurisdiction over certain proceedings in forums other than the bankruptcy court of compelling significance. See *Callaway v. Benton,* 336 U.S. 132; *Order of Railway Conductors of America v. Pitney,* 326 U.S. 561; *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478; *Foust, Admr. of Munson S.S. Lines,* 299 U.S. 77; *Nathanson, Trustee, v. NLRB,* 344 U.S. 25; *Tucker*

[15] 29 U.S.C. § 101, et seq.

v. Texas American Syndicate (C.A. 5, 1948), 170 F. 2d 939; *In re Spier Aircraft Corp.* (C.A. 3, 1943), 137 F. 2d 736; *Milens v. Bostian* (C.A. 8, 1943), 139 F. 2d 282; *Layton v. Thayne* (C.A. 10, 1944), 144 F. 2d 94.

In the present case, both lower Courts indicated that whether arbitration should be allowed was within the *discretion* of the bankruptcy court, thereby relegating the federal law of collective bargaining to a secondary position. Neither Court attempted to reconcile the two laws involved to give effect to or accommodate the intent of each to the other.

The Congressional policies favoring arbitration under collective bargaining agreements and those granting exclusive jurisdiction to the bankruptcy court in winding up the affairs of a bankrupt are not necessarily conflicting and can be reconciled and accommodated. In the instant case, claims could be filed in the bankruptcy proceeding based on the determinations made in arbitration. The bankruptcy court could retain its ultimate jurisdiction to determine the priority of such claims, the amount thereof to be paid and the manner of payment. A reading of the decision of the Court of Appeals clearly indicates, even though it found that the White House had breached its contract with petitioners to pay money into a pension fund, that the court was concerned more with the effect of an arbitrator's award, in terms of what an arbitrator *might* decide, on the creditors of the employer, than on an attempt to reconcile and accommodate the two diverse laws. (Appendix A, pp. 15-17.)

Moreover, it is clear that the Court of Appeals for the Ninth Circuit undertook to pass on the merits of petitioners' arbitration claims when it stated:

> "A submission to arbitration of the questions sought to be raised in the appellants' suit in the court below, such as the existence of a trust or of the preference of appellants' claims as against other creditors of the bankrupt would appear to us to be inappropriate." (Appendix A, p. 17.)[16]

The propriety of a court in passing on the merits of claims proposed for arbitration, announced in *International Assn. of Machinists v. Cutler-Hammer Inc.*, 271 App. Div. 917, 67 NYS 2d 317, aff'd 297 N.Y. 519, 74 N.E. 2d 464, was specifically rejected by this Court in *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566-567.

It is submitted that both the District Court and the Court of Appeals have departed from the usual rules of statutory construction and accommodation. The result of these decisions, which this Court should correct, is that the developing body of substantive federal law regarding collective bargaining agreements and the labor-management relationship have been made subordinate to the Bankruptcy Act, a result clearly in conflict with Congressional intent.

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[16]The record herein, incidentally, does not support the lower court's assertions in this respect. The issues sought to be submitted to arbitration solely concerned disputes arising under the collective bargaining agreement, and did not include claims for preference over other creditors, or other issues with which a bankruptcy court may be solely concerned. (See petitioners' demand for arbitration, R. Vol. 1, pp. 14-15.)

CONCLUSION

For the foregoing reasons this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated, San Francisco, California,
April 7, 1966.

Respectfully submitted,
ROLAND C. DAVIS,
Attorney for Petitioners.

CARROLL, DAVIS, BURDICK & MCDONOUGH,
THORNTON C. BUNCH, JR.,
Of Counsel.

(Appendices Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

Walter Johnson, individually and as Secretary-Treasurer of Department Store Employees Union, Local 1100, etc., et al., Appellants, vs. John M. England, C. E. Strobel and Walter J. Hempy, as Trustees in Bankruptcy of the Estate of Raphael Weill & Co., Inc., a bankrupt, Appellees.	No. 20,087

[January 12, 1966]

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before CHAMBERS, POPE and KOELSCH, Circuit Judges.

POPE, Circuit Judge.

This proceeding was commenced in the Superior Court of the State of California by the appellants as plaintiffs against the defendant Raphael Weill & Company, Inc., which operated the White House department store in the City of San Francisco. It was subsequently removed to the above named district court

upon the application of the appellees. That court vacated and dissolved orders of the State court directing arbitration of certain disputes alleged to exist between plaintiffs and Raphael Weill & Company (herein called White House) requiring the operators of White House to deposit the sum of $158,000 in court, pending the arbitration award, and temporarily enjoining defendants from transferring such sum. This is an appeal from the order so vacating and dissolving such State court orders.

The action in the State court was commenced by the filing of a "Petition for Order Directing that Arbitration Proceed and Complaint for Injunctive Relief Pending Arbitration Award." It alleged that the appellants, as petitioners, represented a local union of department store employees which had a collective bargaining agreement with White House which, among other things, provided for arbitration. Appellants alleged that controversies had arisen between the union and the employer arising out of the terms of the said collective bargaining agreement; that the employer had informed the petitioners that it would probably go out of business and sell its assets; that the union had demanded that the controversies referred to be submitted to arbitration and that the employer had refused. Plaintiffs alleged that the amount of money involved in the arbitration of the controversies was $158,000; that the termination of the business would operate to dissipate all assets of White House and render ineffective and futile any arbitration award to the union; that therefore the employer should be

ordered to deposit said sum of money with the court and should be enjoined from disposing of or transferring any of such sums pending the arbitration award. The prayer was for an order directing that such arbitration proceed in the manner provided for in the collective bargaining agreement and for an order requiring deposit of the sum mentioned and for an injunction against transferring or dissipating that sum.

It appears from copies of letters attached to and made a part of the petition and from affidavits filed in support of the petition that the controversy concerning which the appellant had demanded arbitration concerned the failure of White House to provide a fund for the payment of pensions as required by the collective bargaining agreement. The record here shows without contradiction or controversy that in 1960 White House entered into a trust agreement with the Bank of America purporting to establish a fund for the payment of pension benefits to employees represented by the labor organization under their collective bargaining agreement. However, only $1115.89 had been contributed to the fund by White House since the fund was established through such trust agreement. Unless White House makes additional substantial contributions to that fund, many of the employees entitled to pensions will not receive them.

Upon the filing of the petition on January 27, 1965, the Superior Court issued a temporary restraining order restraining White House from disposing of or dissipating said assets below the level of $158,000. An

order to show cause was issued requiring the defendant to show cause on February 9, 1965, why an injunction should not be issued as prayed for and an order requiring the depositing of said sum should not be made.

On February 3, 1965, White House filed a voluntary petition in bankruptcy in the same district court to which appellants' case had been removed; it subsequently was adjudicated a bankrupt and a receiver was appointed. On February 8, 1965, that court entered an order enjoining the prosecution of suits against the bankrupt. However, on the following day counsel for appellants presented to the State court their application for an order requiring arbitration and for a preliminary injunction, although the order of the district court enjoining the prosecution of suits against the bankrupt was made a part of the record of that court. Counsel for the receiver for the bankrupt appeared and objected to the jurisdiction of the Superior Court but on February 11, 1965 it entered an order directing arbitration and granting a preliminary injunction and requiring the deposit in court of the $158,000 pending the arbitration award or further order of the court.

On petition of the defendant White House the cause was removed as above stated to the court below. The appellants filed a motion to remand which was denied. White House, and its trustees in bankruptcy, who had intervened, moved to dissolve the orders of the Superior Court. After hearing that motion was granted on March 23, 1965, and all the state court orders re-

ferred to were dissolved and set aside. This appeal followed.[1]

Two principal questions are presented. The first one relates to the merits of the appellants' claim that as a labor organization representing employees in an industry affecting commerce, it is entitled to an order from a state or federal court enforcing a collective bargaining contract providing for arbitration of disputes arising thereunder notwithstanding the bankruptcy and cessation of business of the employer. The second question is whether the suit instituted in the state court, as above described, was properly removed to the federal district court. As the last stated question is basic to the jurisdiction of the court below and to our right to review the order of that court, we shall first address ourselves to that question.

It is plain that the motion to remand in this case was denied upon the ground that the district court

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[1]Appellants' brief states that this court's jurisdiction "rests upon 28 USC §1291" and appellees do not question that. The appeal is from the order dissolving the Superior Court's "Order Directing Arbitration to Proceed and for Preliminary Injunction." That order, after directing that such Superior Court order "is hereby dissolved", recites: "It is further ordered, that further proceedings herein are stayed until further order of this Court." This language suggests a problem as to the finality of the order. We need not consider whether the order is appealable under §1291 as disposing of a collateral issue where failure to entertain the present appeal would result in irreparable loss of substantial rights of the appellant, within the rule discussed in United States v. Wood, 5 cir., 295 F. 2d 772, 777-778, and in cases there cited. For here the appeal, being from an order dissolving a temporary injunction, is appealable under 28 USC §1292 and the appeal carries with it to us the power to consider and decide the merits of the whole case, under the rule of Smith v. Vulcan Iron Works, 165 U.S. 518, 525, followed in Myers v. Bethlehem Corp., 303 U.S. 41, 52-53, and in Deckert v. Independence Corp., 311 U.S. 282, 287.

had original jurisdiction under §301(a) of the Labor Management Relations Act (29 USC §185(a)) of a suit claiming violation of a labor contract between an employer and a labor organization representing employees in an industry affecting commerce, and seeking enforcement of an agreement for arbitration of disputes thereunder. See Textile Workers v. Lincoln Mills, 353 U.S. 448. If that be so then the action was removable under the provisions of Title 28 USC §1441(b) providing for the removal of "any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States. . . ."

Both parties concede that White House was an "industry affecting commerce" as that term is used in §301.[2]

Appellants assert that the case as filed in the state court was not a case "arising under" §301(a) of the Labor Management Relations Act or any other law of the United States so as to permit removal under the section referred to. Says the appellant: "[T]he petition and complaint in the state court was cast solely on a state created right to bring suit for violation of a collective bargaining agreement and sought only a

[2]See for example the statement in appellants' brief quoted in footnote 5, infra, which alludes to the "national labor policy favoring arbitration as the preferred method of resolving disputes arising under collective bargaining contracts has been manifested by Congress." The petition for removal alleged that the suit concerned a contract "in an industry affecting commerce" and the motion to remand, and brief in support thereof, did not question this.

remedy under state law." Appellants further assert that the denial of remand deprived them of a right "to cast their action on state-created rights rather than on rights available under federal law, to-wit, §301(a)."

We cannot accept this argument in view of the decisions of the Supreme Court in Teamsters Local v. Lucas Flour Company, 369 U.S. 95, 102-103, and Republic Steel v. Maddox, 379 U.S. 650, 657. When the first of these cases was decided it had been held in Dowd Box Co. v. Courtney, 368 U.S. 502, that a suit to enforce §301(a) of the Labor Management Relations Act, could be brought in a state court as well as in a federal district court. The Lucas Flour case, supra, was one brought in a court of the State of Washington to recover damages for violation of a collective bargaining agreement which provided for arbitration of differences which might arise between the employer and the employee. In affirming the judgment of the lower court the Supreme Court of the State held that §301 could not "reasonably be interpreted as preempting state jurisdiction, or as affecting it by limiting the substantive law to be applied." The court expressly based its decision solely upon state law. Upon review of that decision, the United States Supreme Court posed the question: "Was the Washington court free, as it thought, to decide this controversy within the limited horizon of its local law?" The Supreme Court said: "In Dowd Box we proceeded upon the hypothesis that state courts would apply federal law in exercising jurisdic-

tion over litigation within the purview of §301(a), although in that case there was no claim of any variance in relevant legal principles as between the federal law and that of Massachusetts. In the present case, by contrast, the Washington court held that there was nothing in §301 'limiting the substantive law to be applied,' and the court accordingly proceeded to dispose of this litigation exclusively in terms of local contract law. The union insists that the case was one to be decided by reference to federal law, and that under applicable principles of national labor law the strike was not a violation of the collective bargaining contract. We hold that in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law. . . . The dimensions of §301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills, requiring issues raised in suits of a kind covered by §301 to be decided according to the precepts of federal labor policy. More important, the subject matter of §301(a) 'is peculiarly one that calls for uniform law.' "

In Republic Steel v. Maddox, supra, the employee sued his employer in the state court seeking recovery of severance pay under the terms of a collective bargaining agreement between the employer and the employees' union. A claim by the employer that the employee should not recover because of his failure to employ contract grievance procedures before suit was

rejected on the ground that state law governed the suit. A judgment of the state Supreme Court was reversed on the authority of the Lucas Flour case, supra, the court saying that no positive reasons appeared why the federal general rules should not apply, holding that federal law covered the suit which must be deemed to be one under §301(a).

It must therefore be held that since in effect §301 (a) operated to preempt this field of law, a fair construction of the complaint here filed must be that it is necessarily one pursuant to §301(a) and not to be distinguished from the complaint in the Dowd Box case. It follows that this case was properly removable to the federal district court.[3]

Since we hold that the district court obtained jurisdiction of the cause through removal, we come next to the inquiry whether that court did properly decide the case by dissolving the orders of the California Superior Court.

The appellants here of course acknowledge that §70 of the Bankruptcy Act (Title 11 USC §110) provides that the trustee in bankruptcy shall be "vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title. . . ." And appellant is aware

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[3]See Wright "Federal Courts §20, p. 58: "In the Lincoln Mills case a majority of the Supreme Court read §301 as requiring the federal courts, in such cases, to fashion and apply a federal common law of labor-management contracts. Though this interpretation poses its own difficulties, it obviates any jurisdictional problem, since federal law then provides both the right and the remedy, and the case is one of true federal question jurisdiction."

of §2 of the Bankruptcy Act (Title 11 USC §11) which authorizes the Bankruptcy Court to cause the estates of bankrupts to be collected, reduced to money and distributed, to determine controveries in relation thereto, and to allow and disallow claims against the bankrupt's estate.[4]

What the appellants argue is that we are dealing here with a suit to compel arbitration; that such suits have attained in the process of formulation of federal labor law such an important status that they must be permitted to continue in the court in which instituted despite the filing of bankruptcy proceedings and regardless of whether the business of the employer defendant has come to an end or not. In support of this assertion appellants cite Textile Workers Union v. Lincoln Mills, 353 U.S. 448; United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574; United Steelworkers v. Enterprise Corp., 363 U.S. 593; United Steelworkers v. American Mfg. Co., 363 U.S. 564, and Carey v. Westinghouse Electric Corp., 375 U.S. 261. Appellants' conclusion from this argument is stated as follows: "It must be concluded that suits to compel arbitration, such as in the instant case, are to be

[4]See Ex Parte Baldwin, 291 U.S. 610, 615: "All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference that court may issue an injunction. The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that where a court of competent jurisdiction has, through its officers, taken property into its possession the property is thereby withdrawn from the jurisdiction of other courts. Having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same."

accorded a primary status over bankruptcy proceedings similar to that accorded to the NLRB, if federal labor policy is to be fully effectuated."[5]

It is clear that in dealing with unfair labor practices the National Labor Relations Board may issue an appropriate cease and desist order against a corporate employer even thought it is in the process of liquidation and is being operated through a receiver. The cease and desist order cannot be avoided by a mere reorganization, particularly where the concern is to be reorganized with the respondent retaining an interest. Such was the holding in National Labor Relations Board v. Coal Creek Coal Co., 10 cir., 204 F. 2d 579, which is a case upon which appellants place much reliance. That case, however, makes a distinction which we think is a proper one. The court there dealt with a receivership under which the business would be carried on by the receiver. It noted the difference between the type of receivership before it and an ordinary bankruptcy where the business would come to a complete end and where all the assets would be liquidated and distributed. Said the court: (p. 580) "If, as suggested (and apparently conceded in reply brief) the assets of the Company are to be

[5]Appellants also set forth their proposition in the following language: "It must be concluded that these important employee rights, including the right of arbitration under a collective bargaining contract, which have been recognized by the Courts as surviving the termination of an employer's operations, may not be destroyed merely because an employer files a voluntary petition in bankruptcy. The national labor policy favoring arbitration as the preferred method of resolving disputes arising under collective bargaining contracts has been manifested by Congress, and this intent of Congress has been respected and enforced by the Courts."

sold and liquidated and all interest of the respondent therein extinguished, the questions of unfair labor practices and domination are of course moot. But the order of the Board is directed against the respondent, . . . and if the respondent is to be operated through a receiver, or reorganized with respondent retaining an interest, either proprietary or managerial, the order of the Board with respect to the conceded unfair labor practices will be enforced, for such responsibility cannot be avoided by reorganizations, transfers or any other 'disguised continuance.'"

The appellants have not called to our attention any case holding that ordinary bankruptcy proceedings should be suspended to permit a processing of complaints before the Labor Board, much less suspended to permit prosecution of suits for arbitration under §301(a).[6]

On the other hand, the case of In Re Muskegon Motor Specialties Co., 6 cir., 313 F. 2d 841, cert. den.

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[6]In support of their position appellants cite in addition to the Coal Creek Coal Co. case, supra, National Labor Relations Board v. Baldwin L. Works, 3 cir., 128 F. 2d 39, and In Re American Buslines, D. Neb., 151 F. Supp. 877. None of these involved any clash betwen bankruptcy proceedings and suits under §301(a). They all involved proceedings before the Labor Board. In the Baldwin Works case, the respondent corporation was involved in a reorganization proceeding under §77B of the Bankruptcy Act, 11 USC §207. In that case the corporation's executive personnel and management remained in charge while the company was a debtor in possession. The business was continued in substantially the same manner as prior to the reorganization proceedings. In the American Buslines case, supra, a corporation was being reorganized under Chapter X of the Bankruptcy Act and the debtor and its trustee were continuing operations of the business. It was held that the court in the proceeding for reorganization would not enjoin the prosecution of the representation proceedings.

375 U.S. 832, is an authority directly opposed to the contentions of the appellant. While that case involved a debtor in reorganization proceedings, it appears that the debtor was defunct. It had gone out of business, discharged all of its employees and disposed of its plant and equipment. The union which had represented the former employees claimed vacation pay for the employees for a period which extended past and beyond the date of the termination of the business of the employer. The employer refused to accede to this claim. The union demanded arbitration of grievances and then proceeded to file suit in the district court to compel arbitration. The demand was rejected.[7]

Appellants assert that Muskegon Motor is inconsistent with Republic Steel v. Maddox, supra. The Maddox case presents no such question. There the plant where Maddox was employed closed, but the employer continued its business generally.

Appellants' argument here is based entirely upon their interpretation of what they describe as a federal

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[7]In that case the union made substantially the same argument that appellant presents here. It argued: "Clear federal policy favored arbitration of labor disputes and this constituted such an exceptional circumstance as required the bankruptcy court to surrender its jurisdiction to arbitration." (p. 842) The union relied upon the same cases which the appellant cites here, as above stated. The court there distinguished the cases in which a bankruptcy court has because of exceptional circumstances surrendered jurisdiction, and said (p. 843): "The employer was out of business and had no plant or employees. The collective bargaining agreement had expired on April 14, 1961. Whatever rights the employees had for vacation pay under the collective bargaining agreement had already become fixed. All that remained was a question of law which, it seems to us, could better be passed on by the court rather than an arbitrator. This case does not involve working conditions or practices in a shop, but the law of the land."

policy favoring arbitration of labor disputes. It seems plain that we have here something quite different from the ordinary or typical labor dispute which is appropriately resolved by arbitration. In order to see this, it will help to characterize the relevant relationships. First, it seems clear that the Superior Court of California was not enforcing a trust. The collective bargaining agreement directed that the employer should provide pensions for retired employees and that the employer should make contributions to the retirement plan in amounts actuarially determined to be sufficient "to fund over such period of years as the employer may determine, the retired benefits. . . ." In accordance with this provision the White House entered into an agreement of trust with Bank of America as trustee. However, White House failed to provide this fund except to the extent of $1115.89. No further contribution was ever made. There is no dispute here between the parties as to the existence of a trust claim on the part of the employees or their unions for the $1115.89. There existed no trust, however, with respect to any other sum. As to the other amounts which the White House should have paid or contributed, the relation between the employees and the White House was merely one of debtor and creditor. As stated in Scott on Trusts, 2nd ed., vol. 1, §26.5: "Where a person promises to transfer property to another as trustee at some time in the future, a trust of the property does not arise until he makes the promised transfer."[8]

[8]See Restatement of the Law of Trusts, Second, §26: "A manifestation of intention to create a trust inter vivos at some time

There can be no question that in consequence of all this White House had breached its contract to pay money into a pension fund. But the result was merely that the employees became creditors to the extent of that default, and the relation between the employees and White House in this connection was merely that of debtor and creditor.

The controversy which now arises is between two groups of creditors of White House. On the one hand we have the employees and on the other we have the other general creditors such as creditors for merchandise sold. This does not present the type of grievance which is ordinarily the subject of arbitration under a collective bargaining agreement enforced pursuant to §301(a). Such controversies usually involve disputes between the union and the current operating employer and are generally of such character that they lend themselves most readily to solution through arbitration. In that type of case the arbitrators "sit to settle disputes at the plant level—disputes that require for their solution knowledge of the customs and practices

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subsequent to the time of the manifestation does not create a trust." And see illustrations 13 and 14 as follows:

"13. A and B enter into a written agreement whereby in consideration of B's marrying A, A promises within one year to set aside $10,000 and to hold the money in trust for B. Although no trust arises until A sets aside the money, A is liable for breach of contract if he fails to create the trust, since his promise was made for consideration.

14. A and B, husband and wife, enter into a separation agreement, whereby A agrees within a year to transfer to a trustee to be chosen by them securities of the value of $100,000 to be held in trust for B. Although no trust of the securities arises until A transfers them to the trustees, A is liable for breach of contract if he fails to create the trust, since his promise was made for consideration."

of a particular factory or of a particular industry as reflected in particular agreements." Steelworkers v. Enterprise Corp., 363 U.S. 593, 596.

A decision of an arbitrator here would involve interests of parties who never consented to arbitration, namely, the trustee in bankruptcy and the general creditors. They ought not to be bound by the decision of an arbitrator selected by the employer and the union. The issues here are within the special competence of a bankruptcy court.

Furthermore, if appellants had their way and arbitrators were put in a position to decide, and did decide that the $158,000 were trust funds, or that appellants should be allowed preference, such a decision would not be subject to full judicial review in any court, (see Steelworkers v. Warrior & Gulf Co., 363 U.S. 574). That ought not to happen to these general creditors.

Appellants' claim is that the national labor policy favoring arbitration requires that a suit under §301 (a) to enforce arbitration may be maintained notwithstanding the bankruptcy of the employer and the complete termination of its business, and notwithstanding the fact that the dispute concerns the allocation of corporate funds. The Supreme Court dealt with a similar claim in Nathanson v. Labor Board, 344 U.S. 25, 28. There it was argued that the interest of the United States in eradicating unfair labor practices was so great that a labor board's back pay order should be granted priority of payment against a bankrupt employer. Said the Court: "Whether that should

be done is a legislative decision."[9] Suffice it to say that we do not feel it to be proper for us to make what is essentially a legislative decision with respect to appellants' claim here.

The claim of the employees or of the union as creditors of White House remains unliquidated. The Bankruptcy Act provides adequate machinery for the ascertainment of the amount of the claim and for its liquidation. §26 of the Act (Title 11 USC §49) provides an appropriate method for the determination of the amount of the employees' claims through arbitration. Such an arbitration concerning the amount of the claim is quite appropriate. A submission to arbitration of the questions sought to be raised in the appellants' suit in the court below, such as the existence of a trust or of the preference of appellants' claims as against other creditors of the bankrupt, would appear to us to be inappropriate.

There are other reasons why we think the action of the court below was proper. It was shown in support of the motion to dissolve the Superior Court's orders that on the 8th of February, 1965, the district court in the matter of the bankruptcy of White House made an order enjoining and staying actions against the bankrupt. It happened that the order for a stay

[9]In Nathanson the Board's order requiring payment of back pay to the employees had been completed prior to the filing of the petition in bankruptcy against the employer. There was no necessity for a suspension of bankruptcy proceedings pending a completion of the board's hearing. The court held the board to be a creditor within the meaning of the Bankruptcy Act for the purpose of collecting through the bankruptcy court procedures the amount of back pay awarded.

of such cases, made pursuant to §11 of the Act (Title 11 USC §29) was made by the same judge who entered the decision here appealed from. But even if these orders had been made by different judges of the district court, it would have been improper for the judge acting on the application to dissolve the orders made by the California Superior Court to decline to follow the prior order staying actions against the bankrupt. See TCF Film Corporation v. Gourley, 3d cir., 240 F. 2d 711, 713; Hardy v. North Butte Mining Co., 9 cir., 22 F. 2d 62. The order enjoining and staying actions against the bankrupt made on February 8, 1965 was an order made "in the proceedings in bankruptcy" and was appealable. Bankruptcy Act §24 (Title 11 USC §47). If the appellants were aggrieved, it was by this order staying actions from which an appeal was not taken.

In any event the attempt to impound $158,000 by means of an injunction must fail. Assuming the court below might entertain a suit under §301(a) to enforce arbitration, the ultimate result of such a proceeding could at best be an award of money damages. The $158,000 was undoubtedly part of the general assets of White House. It is not shown to be a trust fund. The injunction issued in the Superior Court was rightly dissolved for this further reason. An injunction is wholly inappropriate in a suit for money.

The decision of the district court is affirmed.

Appendix B

PERTINENT STATUTES

National Labor Relations Act (49 Stat. 449, 1935, 29 U.S.C. Sections 151, et seq., as amended by 61 Stat. 136, 1947, 29 U.S.C. Sections 151, et seq.)

Section 2, (29 U.S.C. Section 152) DEFINITIONS.

"When used in this Act—

"(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

Section 201, (29 U.S.C. Section 171)

"§ 171. *Declaration of purpose and policy.*

That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts

to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies."

Section 203 (29 U.S.C. Section 173)

"(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

Section 301 (29 U.S.C. Section 185)

"Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce

as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Bankruptcy Act (30 Stat. 544, 1898, 11 U.S.C. Section 1, et seq., as amended by 52 Stat. 883, 1938, 11 U.S.C. Section 1, et seq.)

"§ 11. *Creation of courts of bankruptcy and their jurisdiction.*

(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or in any cases transferred to them pursuant to this title;

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(3) Appoint, upon the application of parties in interest, receivers or the marshals to take charge of the property of bankrupts and to protect the interests of creditors after the filing of the petition and until it is dismissed or the trustee is qualified; and to authorize such receiver, upon his application, to prosecute or defend any pending suit or proceeding by or against a bankrupt or to commence and prosecute any suit or proceeding in behalf of the estate, before any judicial, legislative, or administrative tribunal in any jurisdiction, until the petition is dismissed or the trustee is qualified; *Provided, however,* That the court shall be satisfied that such appointment or authorization is necessary to preserve the estate or to prevent loss thereto;

(4) Arraign, try, and punish persons for violations of this title, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section 76 of this title;

(6) Bring in and substitute additional persons or parties in proceedings under this title when necessary for the complete determination of a matter in controversy;

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except

as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

(8) Close estates, by approving the final accounts and discharging the trustees, whenever it appears that the estates have been fully administered or, if not fully administered, that the parties in interest will not furnish the indemnity necessary for the expenses of the proceeding or take the steps necessary for the administration of the estate; and reopen estates for cause shown;

(9) Confirm or reject arrangements or plans proposed under this title, set aside confirmations of arrangements or wage-earner plans and reinstate the proceedings and cases;

(10) Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings;

(11) Determine all claims of bankrupts to their exemptions;

(12) Discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

(13) Enforce obedience by persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) Extradite bankrupts from their respective districts to other districts;

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;

(16) Punish persons for contempts committed before referees;

(17) Approve the appointment of trustees by creditors or appoint trustees when creditors fail so to do; and, upon complaints of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice;

(18) Tax costs and render judgments therefor against the unsuccessful party, against the successful party for cause, in part against each of the parties, and against estates, in proceedings under this title;

(19) Transfer cases to other courts of bankruptcy;

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy: *Provided, however,* That the jurisdiction of the ancillary court

over a bankrupt's property which it takes into its custody shall not extend beyond preserving such property and, where necessary, conducting the business of the bankrupt, and reducing the property to money, paying therefrom such liens as the court shall find valid and the expenses of ancillary administration, and transmitting the property or its proceeds to the court of primary jurisdiction;

(21) Require receivers or trustees appointed in proceedings not under this title, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this title or, where an arrangement or a plan under this title has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this title, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: *Provided, however,* That such delivery and accounting shall not be required, except in proceedings under section 205 and chapters 10 and 12 of this title, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall reexamine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent, either to himself or to others, for services and expenses

under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this title, surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive; and

(22) Exercise, withhold, or suspend the exercise of jurisdiction, having regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States."

Section 70 (11 U.S.C. Section 110)

"§ 110. *Title to property*

(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: *Provided,* That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court

for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided,* That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further,* That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so

ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this title, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is property which is held to be exempt, in

which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

(b) Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: *Provided, however,* That the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified, shall be deemed to be rejected. A trustee shall file, within sixty days after adjudication, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee: *Provided, however,* That the court may for cause shown extend or reduce such period of time. Unless a lease of real property shall expressly otherwise provide, a rejection of such lease or of any covenant therein by the trustee of the lessor shall not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express

covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns such contract or lease to a third person, shall not be liable for breaches occurring after such assignment.

(c) The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

(d) After bankruptcy and either before adjudication or before a receiver takes possession of the property of the bankrupt, whichever first occurs—

(1) A transfer of any of the property of the bankrupt, other than real estate, made to a person acting in good faith shall be valid against the trustee if made for a present fair equivalent value

or, if not made for a present fair equivalent value, then to the extent of the present consideration actually paid therefor, for which amount the transferee shall have a lien upon the property so transferred;

(2) A person indebted to the bankrupt or holding property of the bankrupt may, if acting in good faith, pay such indebtedness or deliver such property, or any part thereof, to the bankrupt or upon his order, with the same effect as if the bankruptcy were not pending;

(3) A person having actual knowledge of such pending bankruptcy shall be deemed not to act in good faith unless he has reasonable cause to believe that the petition in bankruptcy is not well founded;

(4) The provisions of paragraphs (1) and (2) of this subdivision shall not apply where a receiver or trustee appointed by a United States or State Court is in possession of all or the greater portion of the non-exempt property of the bankrupt;

(5) A person asserting the validity of a transfer under this subdivision shall have the burden of proof. Except as otherwise provided in this subdivision and in subdivision g of section 44 of this title, no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee: *Provided, however,* That nothing in this title shall impair the negotiability of currency or negotiable instruments.

(e) (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State

law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.

(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: *Provided, however,* That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision is valid under applicable Federal or State laws.

(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

(f) The court shall appoint a competent and disinterested appraiser and upon cause shown may appoint additional appraisers, who shall appraise all the items of real and personal property belonging to the bankrupt estate and who shall prepare and file with the court their report thereof. Real and personal property shall, when

practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. Whenever any sale of real or personal property of any bankrupt is made by or through any auctioneer employed by the court, receiver, or trustee, such auctioneer, if an individual or a partnership, shall be a bona fide resident and citizen of the judicial district in which the property to be sold is situated, or, if a corporation, shall be lawfully domesticated and authorized to transact such business in the State in which said judicial district is located.

(g) The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

(h) [1]Repealed. July 7, 1952, c. 579, § 23(g), 66 Stat. 430.

(i) Upon the confirmation of an arrangement or plan, or at such later time as may be provided by the arrangement or plan, or in the order confirming the arrangement or plan, the title to the property dealt with shall revest in the bankrupt or debtor, or vest in such other person as may be provided by the arrangement or plan or in the order confirming the arrangement or plan. July 1, 1898, c. 541, § 70, 30 Stat. 565; February 5, 1903, c. 487, § 16, 32 Stat. 800; May 27, 1926, c. 406, § 16, 44 Stat. 667; June 22, 1938, c. 575, § 1, 52 52 Stat. 879; March 18, 1950, c. 70, § 2, 64 Stat. 23; July 7, 1952, c. 579, § 23, 66 Stat. 429."

Removal Statute (36 Stat. 1094, 1911, 28 U.S.C. Section 1441(b), as amended by 62 Stat. 937, 1948, 28 U.S.C. Section 1441(b).

"Section 1441(b)

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 20,087

Walter Johnson, individually and as Secretary Treasurer of Department Store Employees Union, Local 1100, etc., et al.,
Appellants,

vs.

John M. England, C. E. Strobel and Walter J. Hempy, as Trustees in Bankruptcy of the Estate of Raphael Weill & Co., Inc., a Bankrupt,
Appellees.

Appeal from the United States District Court
for the Northern District of California,
Southern Division

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 12, 1966.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

Office-Supreme Court, U.S.
FILED
MAY 11 1966
JOHN F. DAVIS, CLERK

No. 1206

WALTER JOHNSON, individually and as Secretary-Treasurer of Department Store Employees Union, Local 1100, an unincorporated association, on behalf of himself and all its members, and WILLIAM SILVERSTEIN, individually and as Secretary-Treasurer of Retail Shoe & Textile Salesmen's Union, Local 410, an unincorporated association, on behalf of himself and all its members,

Petitioners,

vs.

RAPHAEL WEILL & Co., INC., d/b/a THE WHITE HOUSE, et al.; JOHN M. ENGLAND, C. E. STROBEL, and WALTER J. HEMPY, as Trustees in Bankruptcy of RAPHAEL WEILL & Co., INC.,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari

To the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1206

WALTER JOHNSON, individually and as Secretary-Treasurer of Department Store Employees Union, Local 1100, an unincorporated association, on behalf of himself and all its members, and WILLIAM SILVERSTEIN, individually and as Secretary-Treasurer of Retail Shoe & Textile Salesmen's Union, Local 410, an unincorporated association, on behalf of himself and all its members,

Petitioners,

vs.

RAPHAEL WEILL & Co., INC., d/b/a THE WHITE HOUSE, et al.; JOHN M. ENGLAND, C. E. STROBEL, and WALTER J. HEMPY, as Trustees in Bankruptcy of RAPHAEL WEILL & Co., INC.,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari

To the United States Court of Appeals for the Ninth Circuit

Respondents, C. E. STROBEL, WALTER J. HEMPY and JOHN M. ENGLAND, as trustees in Bankruptcy of Raphael Weill & Co., Inc., pray that the Supreme Court deny the petition

on file herein for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above cause January 12, 1966.

QUESTIONS PRESENTED

1. Is a suit commenced in a state Court for enforcement of an agreement to arbitrate between a labor union and an employer in an industry affecting commerce removable to a federal District Court, when all jurisdictional facts necessary to make Section 301(a) of the National Labor Relations Act, as amended (61 Stat. 156, (1947), 29 U.S.C. § 185 (1952)), applicable appear in the state Court proceedings prior to the expiration of the period for removal as set forth in 28 U.S.C. § 1446(b)?

2. Is the Bankruptcy Court, pursuant to the exclusive jurisdiction granted it by Section 2 of the Bankruptcy Act (36 Stat. 838 (1910), as amended, 11 U.S.C. § 11 (1952)) the proper forum for the determination of a claim of a labor union against the estate of a bankrupt corporation?

STATUTES INVOLVED

In addition to the statutes involved as shown on page 3 of the Petition, the following statutes are also relevant:

Section 1446(b) of Title 28 U.S.C.

Section 26 of the Bankruptcy Act (52 Stat. 855 (1938), 11 U.S.C. § 49 (1952)).

Section 57(d) of the Bankruptcy Act (52 Stat. 866 (1938) 11 U.S.C. § 93(d) (1952)).

The full text of said sections is printed in Appendix A hereto.

STATEMENT

On January 27, 1965, petitioners, on behalf of themselves and all members of certain unions, commenced an action in the Superior Court in and for the City and

County of San Francisco, State of California (hereinafter referred to as the "State Superior Court") to compel Raphael Weill & Co., Inc., d/b/a The White House (hereinafter referred to as the "bankrupt") to arbitrate certain alleged grievances pursuant to the terms of a collective bargaining agreement. (R. Vol. 1, p. 4.) The State Superior Court issued an order to show cause why such relief should not be granted and a temporary restraining order prohibiting the bankrupt from dissipating or otherwise transferring its assets below the sum of $158,000 pending a hearing on the State Superior Court's order to show cause. (R. Vol. 1, p. 19.)

On February 3, 1965, the bankrupt filed a voluntary petition in bankruptcy in the United States District Court, for the Northern District of California, Southern Division (hereinafter referred to as the "District Court") and was duly adjudicated a bankrupt. C. E. Strobel was appointed as receiver for the bankrupt on the same date.

On February 8, 1965, the District Court entered its order in the bankruptcy proceedings enjoining and restraining further prosecution of suits against the bankrupt. At a hearing held before the State Superior Court on the following date, the full text of said order was read into the record. (R. Vol. 4, p. 4.) Despite the clear terms of said order, counsel for petitioners continued to prosecute this action.

A further hearing was held on February 10, 1965, at which hearing the attorney for the receiver made a special appearance to object to the jurisdiction of the State Superior Court. (R. Vol. 4, p. 22.) Ultimately, on February 11, 1965, the State Superior Court entered an order directing arbitration and requiring the bankrupt to deposit in the State Superior Court the sum of $158,000 pending the arbitration award or further order of said State Superior Court. (R. Vol. 4, p. 43.)

Respondents were not elected as trustees in bankruptcy of the bankrupt until February 24, 1965, and were neither parties to nor participated in any way in the State Superior Court proceedings above referred to.

On February 11, 1965, attorneys for the bankrupt filed a petition for removal of the cause to the District Court under the provisions of 28 U.S.C. §§ 1441 and 1446. (R. Vol. 1, p. 1.) The petition alleged that the bankrupt was engaged in interstate commerce and that the matter was, therefore, within the original jurisdiction of the District Court pursuant to the provisions of § 301(a) of the National Labor Relations Act, as amended (61 Stat. 156 (1947), 29 U.S.C. § 185(a)(1952)).

On February 17, 1965, petitioners filed a motion to remand pursuant to the provisions of 28 U.S.C. § 1447(c). (R. Vol. 1, p. 60.) Said motion was denied on March 11, 1965. (R. Vol. 1, p. 86.) Respondents moved to dissolve the order of the State Superior Court compelling the bankrupt to submit to arbitration and requiring the deposit in said State Superior Court of the sum of $158,000. (R. Vol. 1, p. 34.) On March 16, 1965, the District Court granted respondents' motion and on March 23, 1965, the District Court entered an order dissolving the State Superior Court's orders. (R. Vol. 1, p. 131.)

The Court of Appeals for the Ninth Circuit in affirming the District Court's denial of remand found the case properly removable as one arising under the laws of the United States, to-wit, § 301(a) of the National Labor Relations Act, as amended (61 Stat. 156 (1947), 29 U.S.C. § 185 (a) (1952)). (Petition, Appendix A, p. 9.) The Ninth Circuit also found that the provisions of the Bankruptcy Act relating to liquidation of contingent and unliquidated claims applied to the union claims in this case. (Petition, Appendix A, p. 17.)

REASONS FOR DENIAL OF WRIT

1. The Right of Respondents to Remove This Cause to the District Court Was Clear, Involves No Question of Interpretation of Either § 301(a) or the Removal Statute Which Needs to Be Decided by the Supreme Court, and Does Not Disturb the Concurrent Jurisdiction of the State Courts in § 301(a) Cases.

Petitioners misconstrue the decision of the Court below concerning the issue of removal. In their petition, petitioners make the following statements:

> "To say, as does the Court of Appeals, that § 301 preempts this field of law so as to make a suit for violation of a collective bargaining agreement brought in a state Court always removable to a federal Court is to say that the federal Court has *exclusive* jurisdiction, as opposed to concurrent jurisdiction with the state Courts. . . .
>
> ". . . There can be little question, in the light of its erroneous pre-emption rationale, that the holding of the Court of Appeals for the Ninth Circuit, if allowed to stand, has the effect of granting to the federal Courts *exclusive* jurisdiction over all suits for enforcement of collective bargaining agreements in industries affecting commerce." (Petition, p. 12.)

If the Court below had ruled, as petitioners claim, that § 301(a) vests exclusive jurisdiction in the federal Courts, such ruling would, of course, be contrary to the holding of the Supreme Court in *Dowd Box v. Courtney*, 368 U.S. 502 (1962). Furthermore, if the federal Courts had exclusive jurisdiction of this case, removal would have been improper. See *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377 (1922).

The decision of the Court below was not based upon the reasoning that petitioners claim but rather on the reasoning that § 301(a) established true federal question jurisdiction and that a suit under § 301(a) is one arising

under the laws of the United States and is therefore removable. This decision is consistent with the holdings in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957), and *Teamsters' Union v. Lucas Flour Co.,* 369 U.S. 95 (1962), that federal substantive law applies in § 301(a) cases and that § 301(a) does more than merely vest jurisdiction in the federal courts to hear certain categories of labor disputes.

Nor does the decision of the Court below disturb the concurrent jurisdiction of the state Courts. Petitioners confuse the concept of "jurisdiction" with the concept of "pre-emption". The term "pre-emption", as it applies to this case, refers to areas where federal substantive law has superseded state substantive law. The Supreme Court in *Lucas Flour,* held that federal substantive law supersedes state substantive law in cases involving disputes between a union and an employer in an industry affecting commerce, and in *Dowd Box,* that the state courts have concurrent jurisdiction in such cases. These two decisions establish that (1) there is no state cause of action for breach of a collective bargaining agreement where an employer is in an industry affecting interstate commerce and (2) that a suit to enforce such an agreement under federal law may be brought in the state courts. See *Retail Clerks Union v. Thriftimart, Inc.,* 59 C.2d 421, 380 P.2d 652 (1963). Since no state cause of action exists under the facts of this case, the right of a plaintiff to choose between a state-created and a federally-created cause of action does not exist and cases such as *Henry v. A. B. Dick Co.,* 224 U.S. 1 (1912) and *The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22 (1913) are not applicable. Although such suits may be brought in a state Court, they are clearly removable since such cases are ones over which the federal courts had original (although concurrent) jurisdiction. *Fay*

v. American Cystoscope Makers, 98 F. Supp. 278 (S.D.N.Y. 1951)

Cases such as *Gully v. First National Bank in Meridian,* 299 U.S. 109 (1936), and *Pan American Petroleum Corp. v. Superior Court of Delaware,* 366 U.S. 656 (1961), cited by petitioners, announcing the general rule that a case is removable only if the construction of a federal law or the constitution of the United States is directly put in issue by the plaintiff, do not aid petitioners for two reasons.

The general rule as set forth in *Gully* and *Pan American* has been held inapplicable where the only federal element missing from the plaintiff's complaint consists of the status of one of the parties. *Davenport v. Procter & Gamble Mfg. Co.,* 241 F.2d 511 (2nd Cir. 1957); *Minkoff v. Scranton Frocks, Inc.,* 172 F. Supp. 870 (S.D.N.Y. 1959). If such an exception were not made to the general rule, then in many instances a plaintiff could deprive a defendant of his right to remove by improper pleading. *Fay v. American Cystoscope Makers, supra.* In the instant case, petitioners' pleading in the State Superior Court shows all the necessary elements for an action under § 301 except that the pleading did not allege that the bankrupt was an employer in an industry affecting commerce. It is proper to look to the allegations of the petition for removal to ascertain whether the employer is in an industry affecting commerce. *Minkoff v. Scranton Frocks, Inc., supra; Fay v. American Cystoscope Makers, supra;* See, also, *Table Talk Pies of Westchester v. Strauss,* 237 F. Supp. 514 (S.D.N.Y. 1964) (involved § 303(a) of the National Labor Relations Act, as amended 61 Stat. 158 (1947), as amended 73 Stat. 545 (1959), 29 U.S.C. § 187). The petition for removal in this case alleged that the bankrupt was in an industry affecting commerce and such allegations have never been challenged by petitioners.

Gully and *Pan American* are also inapplicable because the necessary elements of an action under § 301(a) were presented in the State Superior Court in this case prior to its removal. The Removal Statute allows removal within twenty days after the filing of plaintiff's complaint or within twenty days after the filing by the plaintiff of some other paper first disclosing the federal question involved. 28 U.S.C. § 1446(b). Such "other paper" can consist of oral testimony so long as the same is a part of the record of the proceedings in the state court. *Fisher v. United Airlines*, 218 F. Supp. 223 (S.D.N.Y. 1963); *Bonnell v. Seaboard Air Line R.R. Co.*, 202 F. Supp. 53 (N.D. Fla. 1962); *Gilardi v. Atchison, Topeka & Santa Fe Ry. Co.*, 189 F. Supp. 82 (N.D. Ill. 1960).

During the hearings conducted in the State Superior Court on February 9 and 10, 1965, counsel for petitioners asserted for the first time that petitioners' action was based upon the National Labor Relations Act:

> "Mr. Davis: In any event, I advised him (United States District Judge Zirpoli) of our position that in view of the proceedings of the National Labor Relations Act, I had asked this Court to continue these proceedings so that I could file a memorandum to establish to this Court's satisfaction that the National Labor Relations Act provisions prevailed over the Bankruptcy Act, and that you could proceed . . . ." (R. Vol. 4, p. 6.)
>
> "Mr. Davis: Yes, Your Honor. As I explained it at the hearing yesterday, as to which this is a continued hearing, in our view, section 15 of the National Labor Relations Act is the basis for this Court's paramount jurisdiction over the Referee in Bankruptcy in a matter such as this, and this matter is a matter which arises under a collective bargaining contract between an employer of the union which are subject to the terms of the National Labor Relations Act, and section 301 of

that Act provides, and the United States Supreme Court has so held, that the Courts, both the state courts and the federal District courts, have jurisdiction to require the parties to a collective bargaining contract to arbitrate the controversy arising under that contract where the contract provides for arbitration, as we say it does here." (R. Vol. 4, pp. 14-15.) (See also R. Vol. 4, p. 7.)

These voluntary statements of petitioners made prior to the filing of the petition for removal disclose the federal question involved and allow removal to the District Court under the rule of the cases above cited and 28 U.S.C. § 1446(b).

Petitioners claim that the decision of the Ninth Circuit in this case "has come into apparent conflict" with the decision of the Third Circuit in *American Dredging Co. v. Local 25, Marine Div., I.U.O.E.*, 338 F.2d 837 (3rd Cir. 1964), *cert. denied*, 380 U.S. 935 (1965). No conflict exists. In *American Dredging*, the plaintiff employer sought a state Court injunction against a union based upon a "no-strike" clause in a collective bargaining agreement. The defendant union removed the action to the federal District Court. The Third Circuit ordered the case remanded to the state Court holding that the Norris-LaGuardia Act deprived the federal District Court of jurisdiction. The issue presented by the Norris-LaGuardia Act is clearly not present in or applicable to this case. The Third Circuit also stated, citing, *Gully, Pan American* and similar cases, that the action was not removable since it could not be ascertained from plaintiff's complaint in the state court that plaintiff was in an industry affecting commerce. The court nowhere, however, discussed the status exception to the rule of *Gully*, nor is there any indication from the opinion of the Court that the plaintiff therein orally volunteered that it relied on federal law.

Removal clearly was proper in the present case, and no issue is presented for decision by the Supreme Court on this point. It is also apparent that petitioners' claim that there is a conflict in decisions of the United States Courts of Appeals is erroneous.

2. Neither the National Labor Relations Act, as Amended, Nor National Labor Policy Requires the Bankruptcy Court to Surrender the Exclusive Jurisdiction Vested in It by Section 2 of the Bankruptcy Act to Determine the Union Claims Herein Involved.

The facts in the instant case are strikingly similar to those presented in the case of *In the Matter of Muskegon Motors Specialties Co.*, 313 F.2d 841 (6th Cir.), *cert. denied*, 375 U.S. 832 (1963). In that case, the Sixth Circuit held (as was held by the Ninth Circuit in this case) that the liquidation of a union claim in bankruptcy proceedings was to be determined by the Bankruptcy Court, rather than pursuant to the terms of a collective bargaining agreement to which the other creditors of the bankrupt were not parties. There is no authority to the contrary.

Throughout their petition and in their briefs in the lower Court, petitioners rely on a "national labor policy" in favor of arbitration to avoid industrial strife. All cases cited by petitioners relate to situations where the employer or a successor is continuing in business and further industrial strife is, therefore, possible. *E.g., Republic Steel v. Maddox*, 379 U.S. 650 (1965) (employer shut down one plant but other plants remained in operation); *NLRB v. Coal Creek Co.*, 204 F.2d 579 (10th Cir. 1953) (business continued by receiver).

Once an employer has permanently ceased doing business, no further industrial strife is possible. Where an employer has been adjudicated a bankrupt, the sole question remain-

ing is the proper distribution of the bankrupt's assets among the bankrupt's creditors. This is clearly a matter for determination by the Bankruptcy Court. See, *Nathanson, Trustee v. NLRB*, 344 U.S. 25 (1952); *NLRB v. Coal Creek Co., supra.*

Petitioners claim they are being deprived of a contractual right to arbitrate the disputes here involved. They fail to recognize, however, that by reason of the intervening bankruptcy, parties other than those to the original collective bargaining agreement now have an interest in the resolution of the union claims. The bankrupt corporation can neither gain nor lose from the manner in which the union claims are determined. Only other creditors of the bankrupt stand to gain or lose. Section 57(d) of the Bankruptcy Act (52 Stat. 866 (1938), 11 U.S.C. § 93(d) (1952)) clearly sets forth the manner for the liquidation of these union claims in proceedings before the Referee in Bankruptcy where other creditors of the bankrupt may participate.

Respondents concede that the Bankruptcy Court will surrender its jurisdiction where other federal legislation clearly supersedes the Bankruptcy Act, e.g. *Anderson v. Bigelow, Receiver*, 130 F.2d 460 (9th Cir.), *cert. denied*, 317 U.S. 690 (1942) (involved Norris-LaGuardia Act, which provides that *no* Court of the United States may issue an injunction involving a labor dispute); *In re Spier Aircraft Corp.*, 137 F.2d 736 (3rd Cir. 1943), *cert. denied*, 321 U.S. 770 (1944) (involved priority of navy wartime regulations over the Bankruptcy Act); *Cullen v. Bowles*, 148 F.2d 621 (2nd Cir. 1945) (explicit provisions of the Emergency Price Control Act vested exclusive jurisdiction in the Emergency Court of Appeals); *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946) (involved a dispute expressly within the jurisdiction of an adjustment board created by statute), but

no provision of the National Labor Relations Act, as amended, requires such a surrender of jurisdiction in this case. Section 301(a) of the National Labor Relations Act (61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1952)) relates to suits between a union and an "employer". Although a Trustee in Bankruptcy is defined as a "person" by § 2(1) of the National Labor Relations Act, as amended (61 Stat. 137 (1947), 29 U.S.C. § 152(1) (1952)), such trustee is not defined as an "employer" in Section 2(2) of the same Act (61 Stat. 137 (1947), 29 U.S.C. § 152(2)(1952)). The Trustees in Bankruptcy in this case had no employees and were not engaged in business and, therefore, it appears clear that such trustees are not employers. Nor are such trustees "agents" for an "employer" since a Trustee in Bankruptcy is vested with title to the bankrupt's assets pursuant to § 70(a) of the Bankruptcy Act (52 Stat. 879 (1938), as amended, 66 Stat. 429 (1952), 11 U.S.C. § 110(a)(1952)) and is a successor to the bankrupt and not an agent for the bankrupt.

Petitioners also rely on Section 26 of the Bankruptcy Act (52 Stat. 855 (1938), 11 U.S.C. § 49 (1952)) which allows the Referee in Bankruptcy in his discretion to refer matters to arbitration. Where an arbitration is ordered by a Referee pursuant to Section 26, he retains control over the subject matter. The Referee could not retain control if arbitration were forced upon the trustees in this case. Furthermore, the scope of review from arbitration under Section 301(a) would be extremely limited. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 at 582-83 (1960).

In view of the foregoing and particularly the agreement of two United States Courts of Appeal, and the lack of a conflicting rule, it would appear that a writ for certiorari should not be granted by the Supreme Court in this case.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Dated, San Francisco, California, May 10, 1966.

Respectfully submitted,

JOHN WALTON DINKELSPIEL,
Attorney for Respondents, John M. England, C. E. Strobel, and Walter J. Hempy, as Trustees in Bankruptcy of Raphael Weill & Co., Inc.

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EDWARD R. STEEFEL
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Of Counsel

(Appendix A Follows)

Appendix A

PERTINENT STATUTES

Removal Statute 28 U.S.C. § 1446(b).

Section 1446(b)

"(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

"If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

Bankruptcy Act Section 26 (52 Stat. 855 (1938), 11 U.S.C. § 49 (1952)).

"Section 49. *Arbitration of controversies*

"(a) The receiver or trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

"(b) Three arbitrators shall be chosen by mutual consent, or one by the receiver or trustee, one by the other party to the controversy, and the third by the two so chosen or, if they fail to agree in five days after their appointment, the court shall appoint the third arbitrator.

"(c) The written finding of the arbitrators or of a majority of them as to the issues presented may be filed in court and shall have like force and effect as the verdict of a jury."

Bankruptcy Act Section 57(d) (52 Stat. 866 (1938), 11 U.S.C § 93(d)(1952)).

"(d) Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however,* That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this title."

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 1206

WALTER JOHNSON, individually and as Secretary-Treasurer of DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100, an unincorporated association, on behalf of himself and all its members, and WILLIAM SILVERSTEIN, individually and as Secretary-Treasurer of RETAIL SHOE & TEXTILE SALESMEN'S UNION, LOCAL 410, an unincorporated association, on behalf of himself and all its members,

Petitioners,

vs.

RAPHAEL WEILL & CO., INC., d/b/a THE WHITE HOUSE, et al.; JOHN M. ENGLAND, C. E. STROBEL, and WALTER J. HEMPY, as Trustees in Bankruptcy of Raphael Weill & Co., Inc.,

Respondents.

PETITIONERS' REPLY BRIEF

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Table of Authorities Cited

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 1206

WALTER JOHNSON, individually and as Secretary-Treasurer of DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100, an unincorporated association, on behalf of himself and all its members, and WILLIAM SILVERSTEIN, individually and as Secretary-Treasurer of RETAIL SHOE & TEXTILE SALESMEN'S UNION, LOCAL 410, an unincorporated association, on behalf of himself and all its members,

Petitioners,

vs.

RAPHAEL WEILL & Co., INC., d/b/a THE WHITE HOUSE, et al.; JOHN M. ENGLAND, C. E. STROBEL, and WALTER J. HEMPY, as Trustees in Bankruptcy of Raphael Weill & Co., Inc.,

Respondents.

PETITIONERS' REPLY BRIEF

It is clear beyond doubt that the National Labor Relations Act, as amended (61 Stat. 137 (1947) 29

U.S.C. § 151) is applicable to trustees in bankruptcy. A trustee in bankruptcy is defined as a person governed by the terms of the Act by Section 2(1) thereof (29 U.S.C. § 152(1)) and is, therefore, an employer against whom actions may be brought under Section 301 (29 U.S.C. § 185). Section 2(2) of the Act (29 U.S.C. § 152(2)) defines an employer as including all "persons" bound by the Act, whether they be "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers" (29 U.S.C. § 152(1)). The employer definition is specific in its exclusions from employer status, and such exclusions do not embrace trustees in bankruptcy.

In view of the express applicability of the National Labor Relations Act to trustees in bankruptcy, it is manifest that suits to compel arbitration pursuant to the terms of collective bargaining agreements may be instituted notwithstanding the advent of bankruptcy proceedings. Trustees in bankruptcy are creatures of the Bankruptcy Act (30 Stat. 544, as amended, 11 U.S.C. § 1), and do not exist until the provisions of the Bankruptcy Act come into play.

Therefore, the decisions cited by petitioners in their Petition for a Writ of Certiorari, reflecting judicial recognition of the principle that Congress has the power to vest in other forums jurisdiction over certain proceedings which may arise in the course of bankruptcy proceedings and the power to *require* that the bankruptcy court *qua* bankruptcy court surrender its

jurisdiction to those other forums, are plainly controlling.

The United States Court of Appeals for the Ninth Circuit has placed great reliance upon the decision of the United States Court of Appeals for the Sixth Circuit in *In the Matter of Muskegon Motors Specialties Co.*, 313 F. 2d 841, as supporting its conclusion that the Bankruptcy Court need not surrender its jurisdiction in favor of arbitration. The case is both erroneous and inapposite. It is erroneous in view of the express applicability of the National Labor Relations Act to trustees in bankruptcy (29 U.S.C. § 152(1) and (2)) and in view of the importance of arbitration of controversies which survive the cessation of the employer's operations.[1] See *Republic Steel v. Maddox*, 379 U.S. 650; *Goodall-Stanford, Inc. v. United Textile Workers* (C.A. 1, 1956), 233 F. 2d 104; *United Furniture Workers v. McCoy-Couch Furniture Mfg. Co.*, (E.D. Ark., 1963), 223 F. Supp. 880. It is inapposite because it involved union claims in the federal district court that the court, *in its capacity as bankruptcy court*, should have *surrendered* its jurisdiction *qua* bankruptcy court in favor of arbitration. Those are not the claims herein. Petitioners seek to enforce the Congressional intent manifested in the National Labor Relations Act, as amended, in providing the state

[1]It should be noted also that the Court of Appeals in *Muskegon*, supra, relied upon state court decisions in Michigan holding that employees had no claim for vacations against an employer who had gone out of business prior to the vacation rights becoming fixed, thus passing on the merits of the arbitration claim, contrary to the principles enunciated by this Court in *United Steelworkers v. Warrior and Gulf Nav. Co.*, 363 U.S. 574.

courts and federal courts (not sitting as bankruptcy courts) as forums for the securing of available remedies, including arbitration, for violation of collective bargaining agreements. In short, petitioners submit that the application of the National Labor Relations Act, as amended, to trustees in bankruptcy, is a clear expression of Congressional intent to permit the parties to collective bargaining agreements to secure full effectuation of those agreements and the national labor policy manifested in the Act through the institution of suits against trustees in bankruptcy in both state and federal courts to enforce those agreements, including provisions for arbitration, under state statutes and Section 301 (29 U.S.C. § 185). There is, therefore, no question in this case concerning the *discretion* of the federal court *qua* bankruptcy court to surrender its jurisdiction in favor of another forum. Congress has made it clear that trustees in bankruptcy can be *required* to submit to arbitration pursuant to the terms of a collective bargaining agreement.

Both respondents and the Court of Appeals for the Ninth Circuit express great concern for the rights of other creditors of the bankrupt. Such rights, we are told, will not be protected by proceedings in arbitration and these other creditors, therefore, will stand to gain or lose. This concern is unfounded. To the extent that the Union's claims under the collective bargaining agreement have priority (or do not have priority) over other creditors' claims under the bankruptcy laws, the Bankruptcy Court itself will so find. To the extent that the Unions' claims involve the express

trust established by agreement between the now-bankrupt employer and the Unions, it is clear that the other creditors have no interest whatever in these assets since trust assets never become part of the bankrupt's estate over which the Bankruptcy Court exerts jurisdiction and against which the creditors may satisfy their claims. *Stickney v. General Electric* (C.A. 4, 1930), 44 F. 2d 362; *In re Brainerd Hotel Co.* (C.A. 2, 1935), 75 F. 2d 481; *In Re Interstate Pipe Co.* (D.C. Pa., 1926) 15 F. 2d 61.

With respect to the question of removability, it should be emphasized that petitioners exercised, in the State Superior Court, their *state-created* right to compel a party to a collective bargaining agreement to submit to arbitration disputes arising under that agreement. The basis for the exercise of this right is a state statute, to wit, Sections 1280 et seq. of the Code of Civil Procedure of the State of California.[2] This is a right clearly provided them by decisions of this Court interpreting Section 301 of the National Labor Relations Act, as amended. See *Dowd Box v. Courtney,* 368 U.S. 502. Clearly, petitioners exercised a *state-created* right. The fact that federal substantive law applies to suits brought in state courts, *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, and *Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95, does not nullify the character of petitioners' state action or change it from a state cause of action to a federal one. These decisions simply impress upon

[2]The terms of the relevant statutory provisions under which petitioners brought their suit in the state court are set forth in the Petition for Writ of Certiorari.

the States the requirement that national labor policy be paramount even in suits brought in State Courts and that state law must conform to this policy, manifested by Congress in the National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.) To the extent that state law does not conform to national labor policy, it will not stand. Respondents urge that the above-cited decisions stand for the proposition that there is no state cause of action for breach of a collective bargaining agreement. If this is the case, California's statutes, under which petitioners instituted their suit in the State Superior Court, have no meaning or validity. Surely, this Court's decision in *Dowd Box v. Courtney,* 368 U.S. 502, which permits parties to collective bargaining agreements to institute suits in state courts, cannot be read in such a patently contradictory fashion. It cannot be doubted that the intent of Congress in enacting Section 301 (29 U.S.C. § 185) was clearly to provide an *additional forum* for the institution of suits of this kind, and was by no stretch of the imagination designed to supplant the exercise by the states' courts of their traditional jurisdiction over suits for violations of collective bargaining agreements.[3]

The decision of the Ninth Circuit Court of Appeals in this case has the serious consequence of depriving the states of any meaningful method of procuring the satisfactory resolution of labor disputes within their geographical borders. The interest of the States and

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[3]See the Court's discussion of the Congressional debate in *Dowd Box v. Courtney,* supra, at page 512.

their citizens in the stability of industrial relations and the maintenance of industrial peace is at least equal to that of the federal government. State statutes have traditionally been utilized as means for achieving the stability so necessary and desirable in labor-management relations and are critically important tools for the achievement of federal and state goals. The decision below granting removal of this cause to the federal court clearly operates to nullify state interest and goals. Such a result was not contemplated by Congress when it provided, by the enactment of Section 301 of the National Labor Relations Act, as amended, the parties to collective bargaining agreements with *additional* means, in the federal courts, for the enforcement of their agreements.

The critical issue herein with respect to the propriety of removal of petitioners' suit to the federal court depends upon whether, under Section 1441(b) of the United States Removal Statute (28 U.S.C. § 1441(b)), it is one "arising under" the Constitution, treaties or laws of the United States. The courts have uniformly held that it is not enough to support removal that a question of federal law may be involved in the suit in the state court, or even that federal principles may have applicability. See *Huckins v. Duval County, Florida* (C.A. 5, 1960), 286 F. 2d 46; *Shelby County, Tennessee v. Fairway Homes, Inc.* (C.A. 6, 1961), 285 F. 2d 617; *Martinez v. Southern Ute Tribe* (C.A. 10, 1959), 273 F. 2d 731; *Jefferson v. Gypsy Oil Co.* (C.A. 8, 1928), 27 F. 2d 304; *International Ass'n of Machinists v. United Aircraft Corp.*

(C.A. 2, 1964), 333 F. 2d 367; *Meyerhoff v. Garten* (D.C. Maryland, 1964), 232 F. Supp. 363; *John Hancock Mut. Life Ins. Co. v. United O. & P. Workers* (D.C., N.J., 1950), 93 F. Supp. 296 and the decisions cited in the Petition for Writ of Certiorari.

It is, therefore, clear that petitioners' suit is not one "arising under" the Constitution, treaties or laws of the United States and removal to the federal district court was improper.

There are many very important and unresolved questions presented by this case, questions which we respectfully submit cry out for review and resolution by the Supreme Court. The Petition for a Writ of Certiorari should be granted.

Dated, San Francisco, California,
May 11, 1966.

Respectfully submitted,
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